IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 448

THE NIAGARA FALLS POWER COMPANY

v.

FEDERAL POWER COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Niagara Falls Power Company, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on October 4, 1943, affirming as modified two orders of the Federal Power Commission which determined for petitioner's hydro-electric project the "actual legitimate original cost" thereof as of March 2, 1921, instead of "fair value" as provided by petitioner's license issued under the Federal Water Power Act of 1920, and directing petitioner to remove from its Fixed Capital Accounts and to charge to its Earned Surplus $15,537,943.56.

Opinions Below

The opinions of the Federal Power Commission are found at R. Vol. V, 2896-2932, 3037-3042. The opinions of the Circuit Court of Appeals (R. Vol. VI, 3115, 3130) have not yet been reported. A petition for rehearing was denied without opinion September 2, 1943 (R. Vol. VI, 3169).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered October 4, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 313 of the Federal Power Act.

Questions Presented

1. Whether the Federal Power Commission may repudiate a vital term of the license issued to petitioner on March 2, 1921 after voluntary application therefor by petitioner and in respect of which Congress declared the license once issued may only be "altered or surrendered upon mutual agreement between the licensee and the Commission" (Section 6), and that not even amendment of the Act "shall affect any license theretofore issued * * * or the right of any licensee thereunder" (Section 28).

2. Whether the United States after contracting in 1921 for an option to buy petitioner's property on the basis of "fair value", may breach the contract in 1942 and make petitioner consent to sell its property to the United States on an entirely different basis, *i.e.*, alleged cost to petitioner's predecessors.

3. Whether the Federal Power Commission, consisting of the Secretary of War (Newton D. Baker), the Secretary of the Interior (John Barton Payne), and the Secretary of Agriculture (Edwin D. Meredith) acted within its statutory powers in issuing to petitioner on March 2, 1921 a "fair value" license under Section 23 of the Federal Water Power Act of 1920 which read:

> "Sec. 23. That the provisions of this Act shall not be construed as affecting *any permit or valid existing right of way heretofore granted,* or as confirming or otherwise affecting any claim, or as affecting *any authority heretofore given* pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: Provided, That when application is made for a license under this section for a project or *projects already constructed, the fair value* of said project or projects determined as provided in this section, shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they can not agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value."

4. Whether a Commission which for seventeen years administratively recognized the validity of a term of a license issued by it, may negative its whole administrative history with respect to said term by completely reversing its position.

5. Whether any principle of administrative law permits the Commission to repudiate a vital term of a license contract where there has been reliance on its terms by the parties thereto for a period of more than 21 years, where the Commission in the exercise of its jurisdiction in the premises has recognized the validity of the vital term and where the Commission has consistently represented to the petitioner and to the Congress that it was obligated to abide by the term of the license here in question.

6. Whether any principle of administrative law forbids a court from overruling a Commission when that "tribunal reverses itself" and deliberately elects to repudiate a vital term of a contract to which the United States is a party, when there is no showing of fraud, misrepresentation or error in fact, but only an arbitrary election on the part of the Commission to reverse an earlier interpretation of the statute which it was directed by Congress to administer, after petitioner had contracted on the strength of the first interpretation and relied thereon for twenty-one years.

7. Whether the Federal Power Commission may confiscate petitioner's property in contravention of amendment V of the Constitution, direct charges to petitioner's Earned Surplus Account and substantially impair petitioner's capital by an order purporting to determine "actual legitimate original cost" of petitioner's hydro-

electric project as of March 2, 1921 instead of negotiating "fair value" as the license provides, and by directing petitioner to write off amounts from its assets following such determination where such action is in direct violation of the license contract which alone gives the Commission jurisdiction in the premises.

8. Whether if "actual legitimate original cost" and not "fair value", as provided in petitioner's license, is properly the subject of a determination, the Commission could disregard the definition of "cost" prescribed by Congress in Section 3 of the Act and by statute incorporated in the Commission's own rules (18 Code Fed. Reg. §103.02-1 *et seq.*), *i.e.*, actual cost to petitioner and not cost to petitioner's predecessors in interest, and thereby confiscate petitioner's property.

Statutes Involved

The statutes involved are the Federal Water Power Act of 1920 (41 Stat. 1063) and the Federal Power Act (c. 687, Title II, 49 Stat. 838, 16 U. S. C. 791-825). Pertinent provisions of these Acts are set forth in the Appendix, *infra,* pages 32-37.

Statement

On March 2, 1921 petitioner accepted the first license issued by the Federal Power Commission under the Federal Power Act of 1920. That license (R. Vol. IV, 1988-2013, Ex. 2) is a contract between the United States and petitioner (R. Vol. V, 2860, Ex. 135). The Act then and now declares that "upon acceptance by the licensee", a license "may be altered or surrendered only upon

mutual agreement between the licensee and the commission" (Sec. 6), and that not even a Congressional "alteration, amendment, or repeal shall affect any license theretofore issued * * * or the rights of any licensee thereunder" (Sec. 28). The license itself required acceptance by petitioner and could be modified only on consent of petitioner (R. Vol. IV, 2001). Among other things, indicating the true contractual relationship created by the license, the United States may "recapture" petitioner's hydro-electric project at a price fixed by statute (Sec. 14)[1] and by the license itself. For the project property existing on the date of the license, the statute and contract provide that the United States shall pay on the basis of "fair value". Section 23 of the Act provides that the "fair value" of the project as of license date "shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license," and the license accordingly contained such a provision (R. Vol. IV, 2006).

The decision of the Court below is an affirmance of the Commission's action in repudiating this vital term of the contract 21 years after the issuance of the license. In addition the Court below has approved the Commission's action in directing a $15,000,000 writeoff from petitioner's assets against earned surplus, an amount far in excess of petitioner's surplus. The material facts underlying the

1. All section references in this petition are to sections of the Federal Water Power Act of 1920 under which petitioner applied for and received the license which has given rise to the instant case. The section references in the opinion of the Court below indicate that the Court erroneously used the text of Federal Power Act of 1935 for reference. The 1920 Act is controlling in this case and was specifically incorporated in petitioner's license (R. Vol. IV, 2003, Ex. 2).

The Federal Power Act is relevant here only insofar as it added procedural provisions for review of the Commission's order.

judgment and decree which petitioner seeks herein to have reviewed follow:

Petitioner and its predecessors had for many years operated a hydro-electric project diverting waters of the Niagara River, an international boundary stream, over its own premises, returning the same to the Maid of the Mist Pool below the Falls in the exercise of its riparian rights, ownership of lands under water, and such permits, both State and Federal, as were from time to time made requisite. There is no dam in or across the Niagara River for this project. The United States has no proprietary interest in the project. The project does not interfere with the navigability of the Niagara River (R. Vol. V, 2676, Ex. 54).

On June 10, 1920, the date of the enactment of the Federal Water Power Act, petitioner had a permit (R. Vol. V, 2745) to divert not to exceed in the aggregate a daily diversion at the rate of 19,500 cubic feet per second, issued by the Secretary of War under and in pursuance of a Joint Resolution (41 Stat. 163). Petitioner also had War Department permits issued under authority of the Rivers and Harbors Act of 1899 (30 Stat. 1121) for the maintenance of a system of cribs and booms in the Niagara River which were the only structures of petitioner occupying any part of the River.

Petitioner's license was issued by the Commission for a "project already constructed" under and in pursuance of Section 23 of the Act (R. Vol. VI, 3119). The license itself recited that "petitioner's application involved diversion of water of the Niagara River through the project of applicant already constructed * * * in respect of which project so far as already constructed said applicant had on the 10th day of June, 1920, a permit, right-of-way and authority, * * *" (R. Vol. IV,

1988, Ex. 2). Petitioner voluntarily applied for and accepted the reciprocal rights and obligations contained in the license thus issued to it by the Commission on March 2, 1921. The Federal Water Power Act contained no prohibition against continued operation of petitioner's project without a license from the Commission. Petitioner, therefore, did not apply for the license *in terrorem.*

Indeed, an avowed purpose of the Federal Water Power Act of 1920 was to provide for the private development of water power. From the First Annual Report of the Federal Power Commission to the Congress it appeared that "For many years Federal laws had been wholly unsuited to prevailing conditions. The rights granted were so insecure and the liabilities imposed so uncertain that only in occasional instances could water-power development which required Federal authority be financed;" (p. 1). The same report recited that "In place of the uncertain tenure and unknown requirements of previous legislation an applicant for the power project under the Federal Water Power Act may secure a license for a term not exceeding 50 years. The license is a contract between the Government and the licensee, expressly contains all the conditions which the licensee must fulfill, and, except for breach of conditions, cannot be altered during its term either by the Executive or by Congress without the consent of the licensee" (p. 50, R. Vol. V, 2860, Ex. 135).

Twenty-one years later, on June 9, 1942, following hearings, the Commission rendered an opinion holding that petitioner "could not and did not qualify for a fair value license under Section 23, and the net investment in its project must be determined on the basis of actual legitimate original cost under Section 4 of the Act" (R. Vol. V, 2909).

The Commission's order found the "book cost of all fixed capital of The Niagara Falls Power Company in service on March 2, 1921 was $44,453,868.68". The Commission's accounting witness testified that such sum was the cost to petitioner of its property measured by securities issued and liabilities assumed therefor at the time of its organization in 1918, plus the net cost of additions to the date of issuance of license (R. Vol. III, 1650-1651, 1655).

The Commission's order allowed to petitioner the amount of $24,680,680.22, as the actual legitimate original cost of its project as of license date, excepting certain items reserved for further consideration. The order also directed that petitioner remove from its fixed capital accounts and charge off against earned surplus the amount of $15,537,943.56 which the Commission held was not allowable as assets on petitioner's books. Since petitioner's surplus is substantially less than $15,000,000, compliance with the Commission's order will substantially impair petitioner's capital (R. Vol. V, 3071).

The Court below first affirmed the Commission's repudiation of the fair value clause in petitioner's license on the ground that the Commission in 1921 had exceeded its powers by including that clause in petitioner's license, because petitioner did not have a continuing Federal permit to divert water from the Niagara River (R. Vol. VI, 3122).

Petitioner had, however, at the time the Act became effective, not only all requisite Federal permits, but also all the Federal permits which were available to it under existing statutes, *i.e.*, authority under a Joint Resolution of Congress and permits from the War Department under the Rivers and Harbors Act. The license as noted above recites possession of a permit by petitioner. The Court thus plainly misconstrued Section 23 and petitioner's quali-

fications for a license thereunder. See pages 2-17, 19-24, *infra.*

In holding that the Commission could repudiate a vital term of the license contract, the Court below said that the case at bar "is different from the usual one in two important respects: (1) There was no customary interpretation, but only a single instance; and (2) The tribunal has reversed itself". The Court failed to appreciate the true nature of the license—that it is an executed contract binding upon the parties thereto and obviously cannot be the subject of administrative rulings. The holding of the Court below completely overlooks the evidence, over a period of 17 years after issuance of the license, that the Commission on behalf of the United States recognized its obligations to carry out the fair value provisions of the license which it has now attempted to repudiate and so advised the Congress (R. Vol. V, 2844, Ex. 128, 2845-2850, Ex. 129, 2854, Ex. 132, 2856-2857, Ex. 133, 2867-2868, Exs. 141-144, 2869-2870, Ex. 145, 2871-2872, Ex. 146).

The Court below further held that the Commission could substitute a determination on the basis of actual legitimate original cost under Section 4 of the Act instead of the appraisal of fair value under Section 23. This determination is at odds with the statutory mandate and the license itself as will be elaborated at pages 12-18, *infra.*

The Court below also affirmed the Commission's determination of actual legitimate original cost of petitioner's project, except as to an item not under review here, and held that the Commission could make that determination by going behind the cost of the project to petitioner, the licensee, a new corporation formed October 31, 1918 and utilizing the alleged cost of project property to predecessors in title to petitioner. The Court below thus

affirmed the Act of the Commission in rejecting the price which petitioner itself paid for the project as the criterion for determination of actual legitimate original cost.

Petitioner contended before the Commission and the Court below that if actual legitimate original cost of its project property as of March 2, 1921 was to be determined instead of "fair value" as provided by its license, such cost was the cost to petitioner, a new corporation formed in 1918, measured by the amount of securities issued and liabilities assumed to acquire the project property from petitioner's predecessors. The Court below rejected petitioner's position and held that the actual legitimate original cost referred to in Section 3 of the Federal Water Power Act of 1920, wherein such cost is "as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'" permitted the Commission to fix the "cost" of petitioner's project on the basis of alleged costs to predecessors. In reaching this conclusion the majority of the Court below considered extensively Section 103.41 of Title 18, Code of Federal Regulations, which is a part of the 1914 I. C. C. Classification but did not apply to petitioner's project the applicable Section 103.02-1—"*The carrier* means the accounting carrier except when otherwise specifically indicated".—Section 103.02-2—"*Costs* shall be actual money costs to the carrier"—and Section 103.02-3—"The charges to the accounts of this classification shall be based upon the cost of the property acquired. When the consideration given for the purchase or improvement of property * * * is other than money, the money value of the consideration at the time of the transaction shall be charged to these accounts * * *".

Specification of Errors to be Urged

1. Did the Court below err in affirming the action of the Commission which effected the repudiation of an express and vital term of the license issued to petitioner on March 2, 1921 under and in pursuance of Section 23 of the Federal Water Power Act of 1920?

2. Did the Court below err in holding that it was forbidden from holding that the instant decision of the Commission was mistaken when the Commission reversed its own action of March 2, 1921 in issuing to and executing petitioner's license?

3. Did the Court below err in holding that, assuming a determination of the actual legitimate original cost of petitioner's project as of March 2, 1921 may be made, such cost may be determined by ignoring the actual cost of the project to petitioner and adopting in lieu thereof alleged costs incurred by predecessors in interest?

Reasons for Granting the Writ

1. Whether the Federal Power Commission as an agent of the United States may by its own order, without consent of the petitioner, repudiate a vital term of its contract with petitioner as a licensee under the Federal Water Power Act of 1920 presents an important question of Federal law which has not been, but should be, settled by this Court.

At June 30, 1942, there were 134 hydro-electric projects under major license.[1a] Such licenses for major projects are for long periods of time, in many cases fifty

1a. Statement of the Federal Power Commission to the 78th Congress pursuant to Section 4(d) of the Federal Power Act for the fiscal year ended June 30, 1942, pages 6-8.

years. Moreover, the Commission has instituted an investigation of all navigable waters of the United States and all other waters of the United States subject to Federal jurisdiction with a view to ascertaining what hydro-electric power developments are now being operated and maintained without a license or other valid permit from a Federal agency. Approximately 1,446 cases will be set for hearing or further investigation concerning unlicensed operation of the project in question.[2] Licenses have recently been required by the Commission in the case of unlicensed constructed projects built both before and after June 10, 1920.[3]

Until the decision below, a licensee could rely on the terms of the license contract which it made with the Commission. Each license is an individual contract looking to the ultimate purchase by the United States of the licensed project. The license terms may vary within the statutory discretion given the Commission.

This Court has considered carefully the far-reaching scope of a license and has recognized the importance of the terms of a license. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 419-429. To petitioner, individually, the terms on which the United States may acquire its project are of vital importance and should not be the subject of repudiation by the Commission twenty-two years after issuance of the license.

The decision sought to be reviewed thus affects not only petitioner in its individual relationship with the Commission but goes to the very heart of the statutory power of

2. Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 76th Congress, First Session, on the Independent Offices Appropriations Bill for 1940, page 116.

3. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. (2d) 155, certiorari denied 315 U. S. 806; *In the Matter of Bellows Falls Hydro Electric Corporation*, 2 F. P. C. Reports 380.

the Commission in its dealings with every licensee with whom on behalf of the United States the Commission has made or may make a contract pursuant to the express terms of which United States may acquire the property of a licensee.

This Federal Water Power Act incorporated in the license (R. Vol. IV, 2003, Ex. 2) and the license itself make the license a valid and binding contract between the United States and the licensee (R. Vol. V, 2860, Ex. 135). Each license must be conditioned upon acceptance by the licensee of all the terms and conditions of the Act (Section 6). A license may be altered only upon mutual agreement between the licensee and the Commission (Section 6). No alteration, amendment or repeal of the Act may affect any license theretofore issued or the rights of any licensee thereunder (Section 28). Petitioner's license required acceptance by petitioner and could be modified only on petitioner's consent (R. Vol. IV, 2011, Ex. 2).

The Commission recognized the contractual nature of the license and so advised Congress in its First Annual Report to Congress (see page 8, *supra*).

Not only petitioner, but Congress was repeatedly told that petitioner was entitled to rely upon that term of the license providing for a "fair value" base for its project then already constructed.

Its Annual Reports to Congress are replete with cumulative evidence that petitioner was deemed entitled to a net investment based on fair value for its then existing plant. Thus in its Fifth Annual Report for the fiscal year ended June 30, 1925, Congress was informed (R. Vol. V, 2867, Ex. 141):

"No. 16. Niagara Falls Power Co., Niagara Falls, N. Y.

"This is a project of very large capacity located at the Falls of the Niagara River. A large part of the project was already constructed when license was issued on March 2, 1921, since which time important additions and extensions have been constructed and placed in service. The fair value of the old plant and the cost of new construction is to be determined."

From its Eleventh Annual Report (1931) under "Accounting Work in Progress" (R. Vol. V, 2868, Ex. 143) there appears:

"16. Niagara Falls Power Co., The Fair value of old properties, cost of new construction, additions, betterments, retirements, etc."

So, too, in its Twelfth Annual Report for the fiscal year ended June 30, 1932, Congress was advised, under "Accounts Audited in Whole or in Part But Investment Not Finally Determined" (R. Vol. V, 2868, Ex. 144):

"16. The Niagara Falls Power Co. Fair value of constructed project"

As late as March 17, 1931, the minutes of the Commission, as reorganized, observed with respect to petitioner (R. Vol. V, 2869-2870, Ex. 145):

"The Federal license was issued in March, 1921, and under its terms a determination of fair value of the property by the commission is required * * *".

"This procedure contemplates an early determination of fair value by mutual agreement as provided in the act, and in the failure of such agreement, will give to the commission opportunity for determination by the court as provided by law".

Thus, the Commission, for more than seventeen years, recognized its obligation in respect of the "fair value of the completed parts of the project as of the date of this license" in its reports to Congress and in its dealings with petitioner (R. Vol. V, 2844, 2845-2850, 2854, 2856-2857, 2867-2868, 2869, 2871-2872).

The Commission, in issuing the license to petitioner, acted within its statutory authority.[4] The "fair value" provisions conform to Section 23 of the Federal Water Power Act. The exercise of discretion by the Commission in issuing the license initially on March 2, 1921 is not now subject to reconsideration or review. *Cf. Gray* v. *Powell*, 314 U. S. 402. No authority in the Act or elsewhere is cited by the Commission or the Court below in support of the holding that the Commission may repudiate a term of the license contract. No fraud or misrepresentation is charged against petitioner. The determination by the Commission that it can now repudiate the "fair value" provisions of petitioner's license is grounded on the same facts which were known to the Commission when it granted the license.

This is not a case where the Court may or should feel obligated to defer to the technical expertness of a regulatory agency in the administration of a statute. The question presented to the Court is whether or not a regulatory agency may with impunity repudiate a vital term of a contract made by it on behalf of the United States with petitioner.

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4. This is not a case where an agent of the United States has entered into an agreement which the law does not sanction or permit, hence (see pages , *infra*) *Utah Power & Light Co.* v. *U. S.*, 243 U. S. 389, 409; *Utah* v. *U. S.*, 284 U. S. 534, 545-546, and *Wilbur National Bank* v. *U. S.*, 294 U. S. 120, 123-124, do not apply. Nor does the license "thwart the plain purpose of a valid law." *United States* v. *San Francisco*, 310 U. S. 16, 31-32.

Observations in recent cases suggest sharp limitations on the power of administrative tribunals to reverse their own solemn adjudications. "We accept this declaration as an administrative construction binding upon the Commission in its future dealings with the companies" (*American Tel. & Tel. Co.* v. *United States,* 299 U. S. 232, 241). "* * * in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the carrier and the Mediation Board. The latter having obtained the determination could not ignore it" (*Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, 182). "No prior decision of the Secretary stands in the way of his making the determination now" (*United States* v. *Morgan,* 307 U. S. 183, 192). "Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed" (*Arizona Grocery* v. *Atchison Ry.,* 284 U. S. 370, 389).

Here the Commission acted as a contracting agent when it determined petitioner entitled to a "fair value" clause and issued the license. Under such circumstances, there is no room for the exercise by the administrative agency of its continuing rule-making power (*cf. Helvering* v. *Reynolds,* 313 U. S. 425, 432; *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 100).

If "the grant of power to revoke did not include by fair intendment a power to invalidate by relation the rates established in the past" (*Gt. Northern Ry.* v. *Sunburst Co.,* 287 U. S. 358, 362), *a fortiori* is there no such power where the power of revocation has been expressly disclaimed by the Congress itself.

2. The decision below is, we submit, a serious blow to the integrity of administrative tribunals which this Court has so consistently sought to safeguard.

In the interests of the integrity of administrative tribunals, this Court should resolve whether the Federal Power Commission may repudiate any provision of its own license.

3. An important question of Federal law is presented by the innovation introduced into that law by holding of the court below that a court is forbidden from overruling a Commission when it "reverses" its own "earlier ruling". In applying that doctrine to the facts at bar, the Court extended the continuing rule-making power of administrative agencies to contractual acts of administrative agencies as to which Congress had disclaimed any power of revision, and as to which *a fortiori* no power of revision had been delegated to the administrative body. Maintenance of the integrity of administrative tribunals, Congress and the Constitution requires correction of this novel doctrine propounded below.

4. An important question of Federal law is presented by the repudiation below of the well settled principle of giving an administrative act "peculiar weight" when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new (*Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315) in favor of a new doctrine that a construction of the Act in 1921, by sponsors of the Act, "has scarcely any weight at all" when the Commission, twenty-one years later, "reverses the earlier one." However broad the scope of

judicial obeisance to true administrative action, it cannot be pressed so far as to supplant the doctrine of contemporaneous construction of a statute with respect to an act and determination which was intended, as here, to have finality. Reinterpretation of a statute may have force where changed conditions suggest the need of new and prospective regulations in the public interest: it can have no scope where the sole object is to declare ultra vires a contract on the strength of which millions of additional dollars have been invested and on the basis of which both Commission and licensee have acted for more than seventeen years. This Court has consistently looked "with disfavor upon any sudden change, whereby parties who have contracted with the Government on the faith of such construction may be prejudiced" (*United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621). This Court should review the extent to which a court is bound by an administrative tribunal's construction of a statute, where that differs radically from the construction which it followed for over a decade and where there has been reliance on the faith of the earlier construction of the Act and substantial investments made in the project predicated on such construction as exemplified in a solemn written and binding contract—the license.

5. Section 23 of the Federal Water Power Act of 1920 has not previously been construed judicially except by the Court below where the result is a denial of petitioner's contract rights under its license of March 2, 1921 and the substantial impairment of petitioner's capital. The rights of petitioner under its license deserve the protection of the Fifth Amendment to the Constitution. Under the circumstances here—where repudiation is made twenty-one years after the acceptance of the contract, petitioner

should be afforded a full review of the interpretation to be given Section 23 in its application to the undisputed facts of record in this case.

6. The Court below and the Commission incorrectly construed Section 23 of the Federal Water Power Act as it applies to petitioner. The "fair value" clause and the Commission's duty to negotiate "fair value" was disregarded by the Commission on the ground that the sponsors of the Act, the contemporaneous Commission, had exceeded its powers, by including in petitioner's license a "fair value" clause, when petitioner did not have a continuing federal permit.

Petitioner had, however, at the time the Act became effective, not only all requisite federal permits, but also all the federal permits which were then available, *i.e.*, authority under a Joint Resolution of Congress and permits from the War Department.

Petitioner's permit and authority under Joint Resolution of Congress,—which was in effect at the time the Act became law (R. Vol. V, 2745-47 Ex. 60-121),—was brushed aside as insufficient, despite the fact that it was a permit or authority "*heretofore* granted" and "*heretofore* given pursuant to law", to quote the words of Section 23. The reasoning seems to have been that since Congress intended to bring all projects, prospective and already constructed, within the framework of federal licensing, and since Congress had the power to require all such projects to submit to licensing, that Congress must necessarily have intended to treat projects already constructed the same as prospective projects unless the federal permits "heretofore granted" were such as to survive the passage of the Act. This is an obvious non-sequitur. An intent to require all projects to be licensed

under the Act is not inconsistent with an intent that where a federal permit had been "heretofore granted" an existing project, such project already constructed should be entitled to a license with a provision for "fair value" as a base. Nothing in the Act remotely suggests otherwise. Indeed, if it be assumed that Congress intended the new Act to be all embracing, then it would naturally follow that no federal permit whatsoever would survive passage of the Act: all projects, prospective, already constructed, with or without federal permits, would have been required to secure a new license under the Act, and hence, under such reasoning, would have been ineligible for a license with a "fair value" base. Even the Commission has not taken this position.

Petitioner's permits, rights of way and authority under State law were held inadequate by the Commission and the Court below to justify the fair value license. The permits under the Rivers and Harbors Act were ignored.

That the "heretofore" referred to the effective date of the Act, and not to authority surviving the Act's passage, appears conclusively from the fact that in recodification, made after 1935, the "heretofore" was supplanted by the words "prior to June 10, 1920", the effective date of the Act (U.S.C.A., Tit. 16, ¶ 816).

The Commission and the Court below reasoned that only applicants with projects already constructed who had continuing federal permits were embraced within the phrase "holding any permit or valid existing right-of-way heretofore granted * * * or * * * any authority heretofore given pursuant to law", (a) because the inclusion of states among the enumerated applicants necessarily excluded persons not possessed of federal authority and (b) because of casual remarks during the Senate debate.

The Commission and the Court below reasoned that since "a state acts of its own authority and not by grant", the inclusion of a state as a prospective applicant with a project already constructed necessarily implied a *federal* permit, right of way or authority heretofore granted. The conclusion does not follow from the premise, nor is the premise itself sound.

Assuming arguendo that a state might in rare instances operate a hydro-electric project solely of its own authority, it would require in most instances permits or rights of way from the riparian owners. Take petitioner's project, for example, which diverts waters of the Niagara River *over its own premises* returning the same below the Falls in the Maid of the Mist Pool. New York State could not maintain such a project without permit, right of way, or authority from the riparian owners. And the inclusion of the word "state" among those entitled to a fair value license for an existing project was to assure such a license to a state having the requisite authority for maintenance and operation of such a project. No greater significance can be attached to that casual word, as the sponsors of the Act, the original Commission, well knew.

Nor does the course of the Act through Congress bear out the conclusion reached below. The Court and Commission, sought support for their conclusion in isolated sentences of three Senators,—spoken during debate (R. Vol. VI, 3120-3221). Nor do the comments support the conclusion that Congress did not intend petitioner to receive a "fair value" base in its license. At most, they show an intent to make petitioner subject to the terms of the Act. But, even if we assume arguendo that Congress expected petitioner to become a licensee, the question still

remains open as to the terms of the license intended for a project already constructed. The only portion of the Congressional record which bears on this question supports the conduct of the Commission in including a "fair value" clause in the license issued on March 2, 1921. The "fair value" clause was added to Section 23 in conference.

Congressman Esch, Chairman of the Special Committee on Water Power, submitted a statement of the House conferees (59 Cong. Rec. 6385) including the following reference to the amendment to Section 23 dealing with fair value:

> "This amendment provides for the determination of the *valuation of projects already constructed* when application is made for a license to come under the provisions of the act. Without such a provision there would be no means of determining valuation. One of the fundamental elements of the act is the current determination of the 'net investment'. No project should be brought under license until steps have been taken to determine the property value which is to be recognized throughout the entire duration of the license. The amendment provides that *'fair value' is the most satisfactory basis of determination* at the date of the issuance of the license."

Congressman Esch, in charge of the passage of the General Water Power Bill, in commenting (59 Cong. Rec. 6524-5) upon Amendment No. 57 and the Committee's report above referred to added with respect to the fair value proviso finally added to Section 23 just prior to the passage of the bill:

> "Amendment No. 57 relates to the *'fair value'* as the basis for net investment *where an existing*

> *power plant comes under this new law upon its own application.* The House did not have any such provision. We feel that it would be necessary to have some basis of valuation on an existing plant when it comes in under the new law upon its own application, * * *."

Obviously, Congress intended the special provisions of Section 23 of the Act to be an inducement to the owner of an existing hydro-electric project to come under this new law upon its own application and take out a license. This is what petitioner did and received in return therefor a "fair value" license. Despite the legislative intent in respect of license terms to be accorded the owner of an existing project, the Court below has erroneously affirmed the Commission's decision to repudiate the "fair value" terms of petitioner's license. The circumstances here are peculiarly appropriate for review by this Court in the interest of substantial justice to petitioner.

7. The Court below has affirmed an order of the Commission which impairs the capital of petitioner and strikes at its financial integrity as of March 2, 1921, the very date when the Commission issued the license, the term of which is sought to be reviewed here. The confiscatory effect of the Court's decision is particularly harsh when made 21 years after petitioner, in good faith and in reliance upon plain understandable language embodied in a contract, elected to permit the United States to acquire its property in accordance with the terms of a formula which the Commission now repudiates and in lieu thereof would substitute another formula which forthwith robs petitioner of more than $15,000,000 of assets.

8. If petitioner is to be denied "fair value" and its project subjected to ultimate acquisition on the basis of

"cost", then the interpretation of the words "actual legitimate original cost" in Section 3 of the Federal Water Power Act raises questions of broad application which have not been, but should be, passed by this Court. Cost is the basis for net investment in most licenses.

In our view the Court below did not give effect to the definition in Section 3 as Congress directed in providing that the term "cost", used in Section 3 of the Act, is "cost" as defined in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission." The Court in lieu thereof substituted its own definition of the term "original cost" as though those words in a special collective sense were controlling to the application of Section 3.[5] The word "original", as applied to cost, appears only once in the entire Federal Water Power Act where it is used in the phrase "actual legitimate original cost".

Section 4 of the Federal Water Power Act of 1920 thus required a licensee to file with the Commission a statement only of the "actual legitimate cost" of a project after construction thereof.

No controlling significance attaches to the single, isolated use of the word "original" or to the words "actual" and "legitimate" as they precede the word "cost" in the single phrase in the Act (Section 3) in which they are used consecutively. The important word is "cost" which Congress directed to be determined in accordance with the 1914 I. C. C. Classification. Neither

5. The concept of "original cost" considered by this Court in *American Telephone and Telegraph Co.* v. *United States*, 299 U. S. 232, does not appear to have been under consideration by Congress where the Federal Water Power Act was enacted. The term "original cost to date" in Section 19(a) of the Valuation Act (37 Stat. 701) was never suggested for use in the Water Power bills. Congress deliberately chose instead the general instructions of the 1914 I. C. C. Classification issued under authority of the earlier Hepburn Act (34 Stat. 593).

"actual", "legitimate" nor "original" can or should be given any special meaning which would conflict with the term "cost" as defined and interpreted in the 1914 I. C. C. Classification. Congress intended to allow a licensee the same *"cost"* that the Interstate Commerce Commission provided for the accounts of a carrier. The Interstate Commerce Commission has uniformly interpreted its classification to mean that cost to the accounting carrier, *i.e.,* licensee, should be allowed. *Matter of Valuation of Bangor & Aroostook Rd.,* 97 I. C. C. 153, 157; *Matter of Valuation of Georgia Southern & Florida Ry. Co.,* 106 I. C. C. 155, 157; *Matter of Valuation of Mobile & Ohio Rd. Co.,* 143 I. C. C. 459, 462-463; *Matter of Valuation of Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. Co.,* 24 Val. 1, 6, 7-8; *Matter of Valuation of New York Central RR. Co.,* 27 Val. 1, 6. And this is true even where the accounting company is formed by consolidation. *Matter of Valuation of Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. Co.,* 24 Val. 1, 7-8.

Alabama Power Co. v. *McNinch,* 94 F. (2d) 601, 607-608 (C. A. D. C.), suggests that where a licensee is a new corporation the cost to such a licensee of its project property is allowable as project cost under Section 4 of the Federal Water Power Act and that in such instance there should be no recourse to alleged predecessor company costs. No other interpretation of this question save in the Court below has been made. Petitioner is a new corporation under a special act of the New York legislature (R. Vol. IV, 2323, Ex. 34) and under the general corporate law of New York—*People* v. *New York, Chicago & St. Louis RR. Co.,* 129 N. Y. 474, 482—which is controlling on the question. *Wabash, St. Louis & Pacific Rwy. Co.* v. *Ham,* 114 U. S. 587, 595.

The Court below plainly erred in attempting to devise its own standard of "original cost" instead of "cost" as defined by reference to the 1914 I. C. C. Classification. The error of the Court below is emphasized by its erroneous reference to Section 208 of Part II of the Federal Power Act, as including the term "actual legitimate *original* cost", when in fact Section 208 authorizes the Commission only to "investigate and ascertain the actual legitimate cost of the property of every 'public utility' ". Moreover, petitioner is not a "public utility" under Part II of the Federal Water Power Act of 1935, but is a licensee whose status was established under the Federal Water Power Act of 1920 when it accepted the license duly issued to it on March 2, 1921.

Moreover, the concurring opinion in the Court below recognizes that "cost to the present owners [*i.e.*, petitioner] is impliedly recognized as a proper factor" in the Commission's opinion. The concurring opinion also observed "Though 'original cost' is not an altogether clear or happy phrase, I am not persuaded that it only refers to the first investor and does not include a present proprietor of a project * * *" (R. Vol. VI, 3130).

The allowance of the actual cost of its project to petitioner is vital to petitioner to the extent that such an allowance will prevent the loss of more than $15,000,000 of petitioner's assets, will save a charge of that amount against petitioner's earned surplus, which charge would confiscate its property and will save petitioner's capital from substantial impairment.

The decision below on the interpretation of "actual legitimate original cost", unless reversed, will constitute a precedent of general importance which appears palpably contrary to the very direction Congress gave the Commission in Section 3 of the Act and the legislative history of that Section.

8. An important question of Federal law is presented by the conflict which the holding below creates between decisions of the Interstate Commerce Commission and of the Federal Power Commission in their application of the identical accounting rules of the former. The Federal Water Power Act defines cost "as defined and interpreted in the classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission" (Sec. 3). The I. C. C. admittedly construes its said Classification to mean that "cost" is cost to the accounting carrier. The Federal Power Commission has been directed by Congress to accept the I. C. C. Classification "as interpreted" by the Interstate Commerce Commission. Yet, contrary to this provision the Court below has construed the I. C. C. Classification to mean cost to the predecessors of the accounting licensee.

Secretary Merrill's[5a] explanation to the special Committee on Water Power of the House of Representatives, 65th Congress, 2d Session, before whom the Federal Water Power Act with its "cost" provisions was evolved, indicates the clearest intention to abide by the I. C. C. definition of "cost":

> "Mr. Merrill: * * * The next important feature, and I think the most important feature of the legislation, is the provision concerning the price at which the properties may be taken over if the Government, at the end of the 50 years, exercises its right of recapture.
>
> "You will find that provision in section 3 among the definitions which precede the text of the bill.

5a. Oscar C. Merrill, first Executive Secretary of the Commission, a statutory officer (Section 2) more than any other person was probably the father of the "cost" provisions of Sections 3 and 4 of the Federal Water Power Act of 1920. An outstanding advocate of the "cost" principle, he nevertheless specifically recommended to the Commission the "fair value" term in petitioner's license (R. Vol. IV, 2301, Ex. 16).

"The term which we have used is 'net investment,'" * * * (p. 38)

* * * * * * * *

"Mr. Esch: You are using the terminology and also the regulations used by the Division of Valuation of the Interstate Commerce Commission?

"Mr. Merrill: Yes; * * *. It was to avoid the use of a long definition, the terms of which might arouse controversy, that it seemed advisable for the United States to adopt through this legislation, and for the purpose named here, that definition of the word 'cost' which the only recognized Federal agency, the Interstate Commerce Commission, has prescribed in its valuation for railroads. The definition here refers only to that part of the classification which I have here, about five pages, that describes and defines what is meant by 'cost'. This definition would not include the classification of the commission as a classification of accounts. It has nothing whatever to do with that.

* * * * * * * *

"The Chairman: Mr. Merrill, would it not be a good idea for you to incorporate at this state of your hearing so much of that definition as may be applicable?

"Mr. Merrill: I will be glad to do so." (p. 39)

[Here follows on pages 40-44 a complete copy of the General Instructions taken from the I. C. C. 1914 Classification.]

So determined was the Congress to tie "cost" to a specific, existing book, chapter and verse, that it rejected an amendment to the bill before passage by the House designed to modify, only slightly, the reference to the "classification of investment in road and equipment of

steam roads, issue of 1914, Interstate Commerce Commission.''[6]

The Court below, however, has erroneously accepted the Commission's determination of ''cost'' where the Commission has determined cost by recourse to predecessors in interest of petitioner. The Court below, contrary to a specific interpretation by the Interstate Commerce Commission, has denied to petitioner, a new corporation formed by consolidation, the cost of its property measured by securities issued and liabilities assumed upon formation in 1918. The Court below has erroneously held that the consolidation to form petitioner was not a ''purchase'' which entitles petitioner to the cost recorded upon formation in 1918. The concurring opinion as noted differs from the majority, to the extent that it recognizes cost as used in the Act to mean cost to petitioner and not to its predecessors (R. Vol. VI, 3130). The concurring opinion, however, errs in holding that there was no proof that the securities represented cost to petitioner. There was uncontroverted evidence of probative value that the money value of the consideration at the time of the consideration, *i.e.*, acquisition by petitioner in 1918, was equal to the cost shown on petitioner's books (R. Vol. III, 1498-1531, 1590-1615, R. Vol. V, 2788-2793, Exs. 74-79, R. Vol. III, 1577-1589, 1532-1563, 1797-1833). The holding by the Court below that it may disregard the statutory mandate for determination of ''cost'' of a project licensed under the Federal Water Power Act or under the Federal Power Act raises a substantial question of general application which should be resolved by this Court.

6. See 58 Cong. Rec. 2034-5. See also H.R. 715, 65th Cong. 2d Sess. with reference to the first inclusion of the "cost" principle in the General Water Power Bill.

Conclusion

It is respectfully submitted that this petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Appendix

Section 23 of the Federal Water Power Act (41 Stat. 1075) reads as follows:

> SEC. 23. That the provisions of this Act shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed, the fair value of said project or projects, determined as provided in this section, shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they can not agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.
>
> That any person, association, corporation, State, or municipality intending to construct a dam or

other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation, it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 3 of the Federal Water Power Act (41 Stat. 1063) reads, in part, as follows:

SEC. 3. That the words defined in this section shall have the following meanings for the purposes of this Act, to wit:

* * *

"Net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated

thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, in so far as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall in so far as applicable be published and promulgated as a part of the rules and regulations of the commission.

Section 4 of the Federal Water Power Act (41 Stat. 1065) reads, in part, as follows:

SEC. 4. That the commission is hereby authorized and empowered—

* * *

In order to aid the commission in determining the net investment of a licensee in any project, the licensee shall, upon oath, within a reasonable period of time, to be fixed by the commission, after the construction of the original project or any addition thereto or betterment thereof, file with the commission, in such detail as the commission may require, a statement in duplicate showing the actual legitimate cost of construction of such project, addition, or betterment, and the price paid for water rights, rights of way, lands, or interest in lands.

The commission shall deposit one of said statements with the Secretary of the Treasury. The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto.

Section 14 of the Federal Water Power Act (41 Stat. 1071) reads as follows:

SEC. 14. That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. The

net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by agreement between the commission and the licensee, and in case they can not agree, by proceedings in equity instituted by the United States in the district court of the United States in the district within which any such property may be located: *Provided,* That such net investment shall not include or be affected by the value of any lands, rights of way, or other property of the United States licensed by the commission under this Act, by the license, or by good will, going value, or prospective revenues: *Provided further,* That the values allowed for water rights, rights of way, lands, or interest in lands shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Section 6 of the Federal Water Power Act (41 Stat. 1067) reads as follows:

SEC. 6. That licenses under this Act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of

this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice.

Section 8 of the Federal Water Power Act (41 Stat. 1068) reads as follows:

> SEC. 8. That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided,* That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

Section 28 of the Federal Water Power Act (41 Stat. 1077) reads as follows:

> SEC. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE NIAGARA FALLS POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. VI, 3115–3132) is reported in 137 F. (2d) 787. The opinions and orders of the Commission are set forth in the record (R. V, 2891–2932, 3035–3042).

JURISDICTION

The decision of the circuit court of appeals was rendered on July 29, 1943 (R. VI, 3115). A petition for rehearing (R. VI, 3133–3167) was denied on September 2, 1943 (R. VI, 3169), and judgment was entered on October 4, 1943 (R. VI, 3170). The petition for a writ of certiorari was

filed on October 22, 1943. Jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Following extensive hearings, the Federal Power Commission, by two opinions and orders, determined (pursuant to § § 3 and 4 (a) of the Federal Water Power Act of 1920 (§ § 3 (13) and 4 (b) of the Federal Power Act of 1935)) the actual legitimate original cost of petitioner's hydroelectric project, finding that the provision in petitioner's license for a determination of the "fair value" of the project under Section 23 of the Act was unauthorized by the statute and therefore invalid. In determining the cost of the project the Commission disallowed three items which it found to be "write-ups" which had been transferred to petitioner's accounts when it was organized by a consolidation of its predecessor companies. Petitioner was directed to set up its accounts to reflect the Commission's determination and to charge the disallowed amounts to surplus. On review, the Commission's orders, with a minor modification, were affirmed by the court below. The questions are:

1. Whether the "fair value" provisions of petitioner's license were unauthorized by Section 23

of the Act, and therefore not binding upon the Commission.

2. Whether the Commission, in determining the actual legitimate original cost of petitioner's project, properly disallowed the "write-ups" transferred to petitioner's accounts when it was formed by a consolidation of its predecessor companies.

STATUTES INVOLVED

The relevant provisions of The Federal Water Power Act of 1920 in its original form are set forth in Appendix A, *infra*. The relevant provision of the Federal Power Act of 1935, amending the Federal Water Power Act of 1920, is set out in Appendix B, *infra*.

STATEMENT

The Niagara Falls Power Company ("petitioner"), pursuant to a Federal Power Commission license, operates a hydroelectric project at Niagara Falls, New York, which diverts water from the Niagara River, a navigable stream, marking the international boundary between the United States and Canada (R. V, 2904). When the license was issued on March 2, 1921, the project consisted principally of the predecessor developments of the Schoellkopf and Stetson companies which were consolidated to form petitioner in 1918.

The original Schoellkopf company, the Niagara Falls Hydraulic Power and Manufacturing Com-

pany, was organized in 1878 and was brought under regulation, because of its distribution facilities, in 1907, when the New York Public Service Commission Law was enacted. The Schoellkopfs then decided to segregate such facilities in a new corporation, Cliff Electrical Distributing Company ("Cliff"), which they organized for that purpose on March 15, 1909 (R. IV, 2147). By agreement of May 4, 1909, the distribution facilities were transferred to Cliff which issued therefor $590,000 of bonds, $250,000 of stock, and $172.63 in cash—a total of $840,172.63, which was $328,471.51 in excess of the book cost of such property to the original Schoellkopf company (R. IV, 2109–10).[1] Shortly thereafter, on March 26, 1910, the Schoellkopfs organized a second new company, the Hydraulic Power Company of Niagara Falls ("Hydraulic"), into which they merged their original company, with its remaining property (R. IV, 2122–3). In this merger Hydraulic issued $14,500,000 of its bonds and stock in exchange for the $500,000 of stock of the original Schoellkopf company, which resulted in an $11,800,482.24 increase of the book cost of the properties transferred (R. IV, 2129, 2139).[2]

The upstream Stetson interests in 1886 organized the Niagara Falls Hydraulic Tunnel, Power

[1] This $328,471.51 increase was the first item disallowed by the Commission (R. V. 2919); see p. 11, *infra*.

[2] This $11,800,482.24 increase was the second item disallowed by the Commission (R. V. 2921); see pp. 11–12, *infra*.

and Sewer Company of Niagara Falls, New York, which name was soon changed to the Niagara Falls Power Company ("Niagara constituent") (R. IV, 2161–2). In 1889 a group of New York financiers, headed by Edward Dean Adams, organized the Cataract Construction Company ("Cataract") which entered into a series of contracts with Niagara constituent under which Cataract acquired control of and agreed to finance the enterprise—Cataract receiving, in addition to its expenditures, a 33⅓% profit of $3,307,975.83 which was charged to the construction accounts of Niagara constituent (R. IV, 2169, 2193, 2205).[3]

In 1918, the Schoellkopf companies (Cliff and Hydraulic) and the Stetson company (Niagara constituent) were consolidated to form petitioner under a special Act of the New York Legislature (R. IV, 2323). The securities of the consolidating companies were exchanged for those of the petitioner and the amounts appearing on their books (with intercompany eliminations) were transferred to petitioner's accounts (R. V, 2927–8). The Schoellkopfs received $13,500,000 par value of petitioner's common stock and the Stetson interests received $984,566.70 of common and $11,515,400 of preferred stock (R. IV, 2213).

Regulation of Diversions from Niagara River.—The diversions through the Schoellkopf and Stet-

[3] This profit of $3,307,975.83 was the third item disallowed by the Commission (R. V, 2924); see p. 12, *infra*.

son plants were originally made pursuant to authorizations obtained from the State of New York (New York Laws, 1896, c. 968; New York Laws, 1892, c. 513).[4] On June 29, 1906, Congress passed the Burton Act (34 Stat. 626) which prohibited such diversions unless authorized by permit issued by the Secretary of War. This Act was to remain in force for three years but was thereafter twice extended (37 Stat. 43, 631). The Act and the permits granted petitioner's predecessors thereunder finally expired on March 4, 1913.

In the meantime, on May 13, 1910, the International Boundary Water Treaty between the United States and Canada was officially proclaimed (36 Stat. 2448). Article V of the Treaty prohibited any diversion of water from the Niagara River for power purposes unless authorized by the United States.[5]

Following expiration of the Burton Act in 1913 there was no Federal legislation permitting such diversions until 1917 when Congress passed the first of a series of joint resolutions authorizing the Secretary of War to issue revocable permits for limited periods (39 Stat. 867). The last

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[4] In 1903 and 1905 petitioner's predecessors received revocable permission from the U. S. Army Engineers, pursuant to the Rivers and Harbors Act of 1899 (30 Stat. 1121, 1151), to maintain a system of cribs and booms in the river, to meet winter conditions (R. V, 2804–05; 2810–11; 2814–15).

[5] The text of Article V appears in full in Appendix C, pp. 40–41, *infra*.

of these resolutions (under which petitioner or its predecessors received revocable permits, e. g., R. V, 2745–47) was adopted on July 12, 1919 (41 Stat. 163) and contained the following proviso:

> That this resolution shall remain in force until the 1st day of July 1920, and no longer, at the expiration of which time all permits granted hereunder shall terminate, unless sooner revoked, or unless the Congress shall before that date enact legislation regulating and controlling the diversion of water from the Niagara River, in which event this resolution shall cease to be of any further force or effect.

The Federal Water Power Act.—On June 10, 1920, Congress passed permanent legislation—The Federal Water Power Act (41 Stat. 1063) which authorized the Federal Power Commission to issue licenses for hydroelectric projects subject to Federal control upon specified conditions including their recapture by the Federal Government upon payment of the "net investment" therein (Sec. 14).[6] Section 3 of the Act defined the net investment as "the actual legitimate original cost thereof as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate

[6] "Net investment" is also the basis for expropriation of excess profits (§§ 10 (d) and (e)), compensation for wartime or emergency use of the project by the United States (§ 16), rate regulation by the Commission (§§ 19 and 20), and court sale of the project if license is revoked (§ 26).

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Commerce Commission', plus similar costs of additions" and minus certain deductions.[7]

Section 23, whose interpretation is involved here, provided for the issuance of "fair value" licenses covering "projects already constructed" to "any person, association, corporation, State, or municipality, holding or possessing" any "permit or valid existing right of way heretofore granted" or "any authority heretofore given pursuant to law."

Petitioner's "fair value" License.—On July 3, 1920, the Commission received a letter from petitioner requesting that it be given a license under the Act (R. IV, 2095), and on January 3, 1921, petitioner filed the requisite formal application (R. IV, 1933–1987). The latter recited that petitioner's water rights consisted of its "common law riparian rights," its ownership of the bed of the Niagara River at the point of diversion, grants and statutory authority from the State of New York, and "the conduct, agreement, and pledge of the Government of the United States whereby a promise was given of a license from the Government of the United States under and in pursuance of and to the full extent permitted" by the 1910 Treaty (R. IV, 1963).

In the hearings held by the Commission in January 1921 on this and nine other applications for licenses to divert water from the Niagara

[7] The relevant provisions of the "classification" are set out in full in Appendix D, pp. 42–47, *infra*.

River, petitioner relied upon its "New York State rights" (R. IV, 2015, 2076). Thereafter, on March 2, 1921, the Commission issued a fifty-year license to petitioner authorizing it to divert 19,500 cubic feet of water per second from the Niagara River through its project (R. IV, 1988–2013).

The license contained a recital that with respect to the project, so far as already constructed, petitioner "had on the 10th day of June, 1920, a permit, right-of-way and authority," and provided in Paragraph 9 that "the fair value of the completed parts of the project as of the date of this license shall be determined as early as practicable in the manner prescribed by the Act * * *" (R. IV, 1988, 2006). Paragraph 10 required the segregation of certain of petitioner's property "in the determination of the fair value of the project already constructed to be hereafter made as provided by Section 23 of the Act" (R. IV, 2006–07).

The terms and conditions of the Act[8] were specifically made part of the license, which also provided that petitioner would be relieved from any condition in the license if it should be adjudicated in any suit by or against the Commission that the Commission "is without authority to impose such condition in granting a license under similar circumstances" (R. IV, 2003, 2011).

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[8] Unless otherwise indicated, all references herein to "the Act" are to the Federal Water Power Act of 1920 (Appendix A, pp. 26–37, *infra*).

Subsequent Commission Proceedings.—In 1927 the Commission on the basis of a comprehensive opinion by its General Counsel, formally decided that a "fair value" license under Section 23 could be issued only to an applicant which possessed a subsisting Federal authorization under which it could, at its option, continue to operate its already constructed project in lieu of obtaining a license under the Act (R. V, 2877–2880).

On February 17, 1930, petitioner was furnished a copy of an opinion of the Commission's Solicitor holding that it was required to accept a determination based on historic cost, rather than fair value, and would have to permit inspection of its pertinent records for that purpose (R. V, 2875–76). On March 17, 1931, petitioner agreed to grant the Commission access to the records of its constituent companies (R. V, 2869).

The results of an accounting and engineering analysis by the Commission's staff were embodied in a report dated July 8, 1938 (R. IV, 2100–2249). The report was served upon petitioner (R. I, 1), which duly filed its protest thereto (R. I, 3–34). Extended hearings were then held between June 1 and November 1, 1939 (R. I, 36–R. III, 1858), and were followed by oral argument before the Commission *en banc* on May 26, 1941.

The Commission's Determination.—On June 9, 1942, the Commission issued its Opinion No. 77 (R. V, 2896–2932) and order determining the

actual legitimate original cost of petitioner's project as of license date, March 2, 1921, and prescribing the accounting therefor (R. V, 2891–94).

In its opinion, the Commission found that the "fair value" provisions of petitioner's license were unauthorized by the Act, since petitioner "did not possess any valid existing permit, right-of-way, or authority from the Federal Government on July 3, 1920 when it applied for a license" and accordingly "could not and did not quality for a fair value license under Section 23" (R. V, 2909). The Commission further found that the unauthorized "fair value" provisions in the license furnished "no basis for legal or equitable estoppel" and that the net investment in petitioner's project had to be determined on the basis of actual legitimate original cost under Section 4 of the Act (R. V, 2909).

The Commission found and allowed $24,680,-680.22 as such actual legitimate original cost, exclusive of certain items (not in issue here) reserved for further consideration (R. V, 2892, 2932). The Commission, in so doing, disallowed three items which had been transferred to petitioner's accounts in the 1918 consolidation: (1) The $328,471.51 added to the book cost of the Schoellkopf distribution facilities when they were transferred to Cliff (see p. 4, *supra*); (2) the $11,800,482.24 added to the book cost of the bal-

ance of the Schoellkopf properties when they were transferred to Hydraulic (see p. 4, *supra*); and (3) the $3,307,975.83 Cataract profit recorded in the construction accounts of Niagara constituent (see pp. 4–5, *supra*). Holding that the 1918 consolidation was not an arm's length transaction, the Commission rejected petitioner's contention that it could not "go behind" the consolidation (R. V, 2928).

Petitioner was directed to correct its accounts to reflect the Commission's determination and charge the disallowances to earned surplus (R. V, 2893–94). Upon application for rehearing, the Commission stayed the accounting requirements it had prescribed and directed petitioner to show cause why such requirements should not be made effective, and to submit such accounting treatment as it might propose for disposition of the disallowances (R. V, 3017–18). Upon consideration of petitioner's response (R. V, 3019–34), the Commission found by its Opinion No. 77–A and order of September 1, 1942 (R. V. 3035–42) that petitioner had failed to show such cause or propose any proper accounting treatment for the disallowances. The stay of the prior order was accordingly dissolved.[9]

The Decision Below.—On petition for review (R. V, 3080–84) the United States Circuit Court of

[9] A subsequent order of October 29, 1942, provided an alternative method of disposing of the disallowances, which petitioner rejected (R. V, 3076–3079).

Appeals for the Second Circuit on July 29, 1943, rendered an opinion (R. VI, 3115–3129) sustaining the Commission's orders subject to a modification not material here. After denying a petition for rehearing (R. VI, 3169), the court entered its judgment affirming the Commission's orders as modified (R. VI, 3170).

ARGUMENT

1. Section 23 of the Act provides for the issuance of "fair value" licenses to "any person, association, corporation, State, or municipality, holding or possessing" any "permit or valid existing right of way heretofore granted, or * * * any authority heretofore given pursuant to law." The Commission and the court below correctly held that only applicants "holding or possessing" valid authority from the Federal Government as of the date of the application are entitled to such a license. Petitioner at the date of its application possessed no such authority, and the Commission and the court therefore correctly held that the "fair value" provision had been inserted by the Commission in the license without legal authority, and was consequently void.

Petitioner apparently does not now contend that on July 3, 1920, the date on which it applied for a license, it possessed any continuing Federal diversion permit.[10] It argues, however, that upon

[10] Petitioner's last Federal authorization—that conferred by the joint resolution of July 12, 1919 (*supra*, pp. 6–7)—was

a proper construction of the section a "fair value" license might legally be issued to any person possessing a permit as of the date the Act became effective. It argues further that the section is not confined to persons holding Federal permits, but may include also those holding rights acquired from the States.

The first of these contentions is plainly without merit. Applications may be made under the section only by persons "holding or possessing" a permit or authority; the phrase "holding or possessing" is clearly inconsistent with a construction that expired permits would suffice.

Petitioner's second contention is likewise unsound. As indicated above (supra, pp. 5–8), the Act was the first comprehensive permanent legislation adopted by Congress to regulate and control the diversion of water subject to federal jurisdiction. It was enacted against a background of existing federal permits.[11] Section 23, providing

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terminated by passage of the Act on June 10, 1920. The permission obtained by petitioner's predecessors under the Rivers and Harbors Act of 1899 to maintain a system of booms in the river was of no avail, for, as the court below held, such permission "gave them no right to take any water" (R. VI, 3118), and any implied consent to the diversions which might be culled from such permission "was curtailed and qualified" by the Burton Act of June 29, 1906, the 1910 Treaty with Canada, and the joint resolutions of 1917 and 1919. See *United States* v. *Grimaud*, 220 U. S. 506, 521.

[11] Prior to the passage of the Act, hydroelectric developments on the public domain had been authorized by permits issued by the Secretary of Interior under the Act of February

for the issuance of "fair value" licenses, was adopted in recognition of the existence of outstanding federal permits, and was intended to induce voluntary applications covering projects already constructed under continuing federal authorizations which would permit their continued operation outside the Act (cf. Pet. 24). That it had no concern with possible existing authorizations derived from the states is demonstrated by the use of the word "State" in the section itself among the categories of persons who may apply for licenses. As the court below pointed out, "a state acts of its own authority and not by grant," and "it would be absurd to suppose that a corporation operating under a state's license could be immune from federal control when the same 'project' would not be, if operated by the state itself" (R. VI, 3119).[12]

15, 1901 (31 Stat. 790), and in the national forests by the Secretary of Agriculture under the Act of March 4, 1911 (36 Stat. 1235, 1253). Developments on navigable streams were governed by the Rivers and Harbors Act of 1899 (30 Stat. 1121) which required a special act of Congress, as well as approval of the Secretary of War. At least 82 such special acts had been passed prior to enactment of the Federal Water Power Act. See Kerwin, *Federal Water Power Legislation*, App. IV (1926).

[12] See *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. (2d) 155 (App. D. C.), certiorari denied, 315 U. S. 806, and *Bellows Falls Hydroelectric Corp.*, 2 F. P. C. 380, 386, 37 P. U. R. (N. S.) 257, 262, recognizing the insufficiency of state rights under similar language in subsection (b) of Section 23, which was added by the 1935 amendments to the Act. The *Pennsylvania Water & Power*

Furthermore, the legislative history of the section shows clearly that in considering Section 23 Congress had before it the contentions of petitioner as to its rights derived from the State of New York, and determined not to recognize those rights. After the "fair value" proviso had been added to the section in the Senate (59 Cong. Rec. 1226), an amendment to the first portion of the section was adopted, providing that nothing contained in the Act should be construed "as confirming or otherwise affecting any claim." Senator Wadsworth, who had offered the amendment, explained its purpose as follows (59 Cong. Rec. 1482):

> Mr. WADSWORTH. I have a difficult situation in mind. It is one that the Senator from Wisconsin has often spoken about—*The Niagara Falls situation.* It so happens that the rights that those companies received there years and years ago, as I understand and recollect, came as grants from the State of New York; and *those companies*—rightly or wrongly, I do not know which—*have claimed, or have indicated that they might claim, certain continuing rights to the diversion of water*

Co. case, in addition to being determinative here, disposes of the same question as it may arise in the 1446 investigations referred to in the petition (Pet. 13). As to the 134 outstanding licenses referred to in the petition (Pet. 12), only 13 provide for "fair value," and, as shown by the table in Appendix E, pp. 48–49, *infra*, no similar question can now arise in any of those cases.

> *and the generation of power.* It might be said that that claim has been a constantly pending one, but it never has been settled. The Niagara situation always has been uncertain as to its future for that reason. *Now, I do not want this bill in any way to confirm that claim.*[13]

Accordingly, the "fair value" provisions in petitioner's license were unauthorized by Section 23. Being unauthorized, they were void.[14] Cf. *Louisiana* v. *Garfield,* 211 U. S. 70, 77. There is no room for the doctrine of estoppel in such a case as this; to hold the Commission bound by its original error of law would violate the fundamental principle that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit" (*Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409).[15] "Those

[13] Emphasis supplied throughout this brief unless otherwise indicated.

[14] Petitioner seeks to inject into the case an issue as to whether the court below, had it disagreed with the Commission as to the proper interpretation of Section 23, would be bound nevertheless by the Commission's administrative construction (Pet. 4, 12, 18). There is no such issue, for the court below did not regard itself as so bound, but reexamined the question as a matter of first instance and reached its own independent conclusion as to the meaning of the Act.

[15] Thus, "the mistaken view" of the Secretary of War as to whether the Susquehanna River was "navigable" as a matter of law, "even if relied upon by petitioner in the erection of its dam," could not affect the license requirements of Section

dealing with an agent of the United States must be held to have had notice of the limitation of his authority." *Wilber National Bank* v. *United States,* 294 U. S. 120, 123–124. See also *United States* v. *San Francisco,* 310 U. S. 16, 31–32. Nor does the Commission's delay in correcting its error militate against its authority to make such correction at the time when it was called upon to determine the proper valuation of the project.[16] The administrative authority here involved was plainly "in its nature continuing" (*Wilbur* v. *United States,* 281 U. S. 206, 217). The license provided by its terms for a *future* determination of fair value "in the manner prescribed by the Act" (R. IV, 2006); and the only valuation of petitioner's project which the Commission could legally make "in the manner prescribed by the Act" was one based on "actual legitimate original

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23 (b) of the Act. *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F. (2d) 155, 162–163 (App. D. C.), certiorari denied, 315 U. S. 806.

[16] It should be noted that there was far less delay than suggested by petitioner. The Commission did not "for seventeen years administratively recognize" the validity of the "fair value" provision of the license (Pet. 4). The license was issued in 1921. In 1927 the Commission formally adopted in a general opinion the construction of the Act which it followed in this case (R. V, 2877–2880), and on February 17, 1930, it advised petitioner specifically that it would be required to accept a determination based on historic cost, rather than "fair value" (R. V, 2875–76). Prior to that time, petitioner had consistently refused the Commission access to its predecessors' books (R. V, 2869).

cost" (Sec. 3), as generally contemplated by the Act except in proper cases under Section 23.[17]

Petitioner can point to no real prejudice resulting from the Commission's correction of the original error. Its project, to the extent that valuation is involved here, had been constructed well before its application for a license in 1921, and therefore in no sense upon the "faith of the earlier construction of the act," or in reliance on the "fair value" provisions of the license later issued (cf. Pet. 19). If the Commission had made no original error, petitioner could have followed no different course than results from the order under review. It would have had to accept the "cost" license which was the only license to which it was by law entitled, for its alternative would have been to risk having its project rendered useless, except as salvage, by action of the Commission in authorizing others to exhaust the maximum diversion of 20,000 c. f. s. allowed by the 1910 treaty. There is no rational basis, nor support in the record, for any inference that the license would have been rejected in the absence of its "fair value" provisions.

2. In determining the actual legitimate original cost of petitioner's project, as required in view of its determination that the "fair value" provi-

[17] Section 28 of the Act, providing against legislative amendment or repeal of the terms of any license, is of no help to petitioner. There has been no such amendment or repeal. Moreover, the protection to be accorded can reasonably apply only to valid provisions of licenses.

sions of petitioner's license were void, the Commission disallowed the three "write-ups," totalling some $15,500,000, which were transferred to petitioner's accounts from those of its constituent companies (Hydraulic, Cliff, and Niagara constituent) in the 1918 consolidation (R. V, 2677; R. II, 1051–1203). These "write-ups" did not represent any investment, but merely arbitrary additions to the book cost of the property, made, as the Commission found, with "no semblance of arm's length bargaining" (R. V, 2921, 2922, 2927).[18]

Petitioner makes no attempt to justify these "write-ups" as items of cost or investment to its predecessors. Instead, it contends that the 1918 consolidation converted the "write-ups" into part of the actual legitimate original cost of the project to it (Pet. 24–27). But this consolidation was merely an exchange of the securities of petitioner for those of its constituent companies—securities having no market value and merely rep-

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[18] The $328,471.51 was added to the book cost of the Schoellkopf distribution facilities when transferred to Cliff, and the $11,800,482.24 was added to the book cost of the balance of the Schoellkopf properties when transferred to Hydraulic. As the Commission found, these transactions "effected no change in the ownership and control of the property" (R. V, 2921, 2922). The balance of the write-up, $3,307,975.83, represented a profit of 33⅓% to Cataract on its development of the Stetson plant (R. IV, 2193) and was included in the construction accounts of Niagara constituent, which was wholly owned by Cataract (R. V, 2927). (See pp. 3–5, *supra*.)

resenting the properties of the constituent companies (R. III, 1510–11)—without any valuation of the properties by either the New York Legislature which authorized the consolidation (N. Y. Laws, 1918, c. 596) or the New York Public Service Commission (R. IV, 2447; R. V, 2928). There was likewise no occasion or incentive for any of the parties to the consolidation to scrutinize each other's property accounts.[19] As a transaction from which arm's length bargaining was absent (R. V, 2928), the 1918 consolidation was properly disregarded by the Commission in favor of the actual investment in the project,[20] in determining actual legitimate original cost.[21]

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[19] The enabling act provided that petitioner's initial capital could equal but not exceed "the aggregate of the outstanding capital stocks and the surpluses, unimpaired reserves and undivided profits" of the consolidating companies (New York Laws, 1918, c. 596).

[20] Section 14 of the Act, authorizing the United States to take over a licensee's project upon expiration of the license, provides that the "net investment * * * in the project" payable to the licensee in such case, "shall not include or be affected * * * by good will, going value, or prospective revenues." The largest of the three write-up items, totalling almost $12,000,000, was made without any inventory or appraisal of the property (R. V, 2540) and was based entirely upon the "probable future earnings" (R. V, 2541; R. IV, 2125).

[21] *Alabama Power Co.* v. *McNinch*, 94 F. (2d) 601, 608 (App. D. C.); *Alabama Power Co.* v. *Federal Power Commission*, 128 F. (2d) 280, 284 (App. D. C.), certiorari denied, 317 U. S. 652; *Alabama Power Co.* v. *Federal Power Commission*, 134 F. (2d) 602, 609 (C. C. A. 5); *Puget Sound*

The Commission's determination of the actual legitimate original cost of petitioner's property accords with the definition of "cost" contained in the "Interstate Commerce Commission Classification of Accounts of 1914", which is referred to in the definition of "net investment" in Section 3 of the Act. After full and careful consideration, the court below concluded that the I. C. C. classification contemplates the determination of the "cost of original construction," and held that the Commission's disallowance of items which obviously did not represent "cost of construction" was in accord with such classification (R. VI, 3123). That Congress also so understood the basic approach of the I. C. C. classification is plain from Section 4 (a) of the Act, which requires the licensee of a project to file with the Commission a statement "showing the actual legitimate *cost of construction* of such project," in order to "aid the Commission in determining the net investment" of the licensee therein.

The asserted conflict between the Interstate Commerce Commission and the respondent in interpreting the classification (Pet. 28) is entirely

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Power & Light Co. v. *Federal Power Commission*, 137 F. (2d) 701, 703 (App. D. C.). This has been the consistent practice of the Commission. See, e. g., *Chelan Electric Co., Licensee*, 1 F. P. C. 102, 108, P. U. R. 1933E, 332, 337; *Louisville Hydro-Electric Co., Licensee*, 1 F. P. C. 130, 136, 1 P. U. R. (N. S.) 454, 461; *Lexington Water Power Co., Licensee*, 1 F. P. C. 430, 469, 473.

without foundation. The I. C. C. decisions cited by petitioner (Pet. 26) do not involve a situation like the one at hand, and were moreover decided after the passage of the Federal Water Power Act of 1920. They would consequently not be controlling (cf. *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244). Furthermore, it is clear that Congress meant to incorporate the classification only "as interpreted" by the I. C. C. as of the date of the Act's passage, and regardless of subsequent interpretations by the I. C. C. (Hearings before the Committee on Water Power of the House of Representatives, 65th Cong., 2d Sess., March 18 to May 15, 1918, pp. 40–41). And shortly prior to the passage of the Federal Water Power Act, the I. C. C. had disallowed intercorporate profits of affiliated corporations and had gone behind the "purchase price" to ascertain cost where there had been an absence of arm's length bargaining. *Kansas City Southern Ry. Co.*, 75 I. C. C. 223, 233, 234. As the lower court held, the Commission's action was clearly in accord with the 1914 classification.[22] Indeed, the Commission's interpretation of the 1914 classification in this case is well supported by the Classification itself.[22]

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[22] The general plan of the classification in question is set out in Sections 1 and 2 (18 C. F. R. 103.02–1 and 103.02–2). Section 1 ("Accounts for Investment in Road and Equip-

CONCLUSION

The decision of the court below affirming the Commission's order is correct. There is no conflict and the case presents no question calling for further review. It is therefore respectfully sub-

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ment") provides that the accounts prescribed in this classification are designed to show the "investment of the carrier in property devoted to transportation service." Section 2 ("Items to be Charged") provides that "To these accounts shall be charged the cost of original road, original equipment, road extensions, additions, and betterments"; defines "original road" and "original equipment" as that "provided and arranged or in the original plan for the construction of a new road"; and declares that "Costs shall be actual money costs to the carrier." Section 3 (18 C. F. R. 103.02–3) provides that "The charges to the accounts of this classification shall be based upon the cost of the property acquired. When the consideration given for the purchase or improvement of property the cost of which is chargeable to the accounts of this classification is other than money, the money value of the consideration at the time of the transaction shall be charged to these accounts." Account 41 of the Classification (18 C. F. R. 103.41) provides that "Where the consideration given for the property *purchased* is other than cash, such consideration shall be valued on a current cash basis," but as all three judges below agreed, the 1918 consolidation, constituting a mutual pooling of the interests of two companies, cannot be regarded as a "purchase" within the meaning of that Account (R. VI, 3124–3125).

Petitioner complains of the conclusion of two of the judges below that "Section 103.41 of the 'Classification' should not be read as incorporated into the Federal Power Act * * * at all" (R. VI, 3125–3126). But, as the concurring judge pointed out in refusing to follow this rationale, the Commission has not gone so far (R. VI, 3130), and until the Commission adopts such a construction, the question is academic.

mitted that the petition for a writ of certiorari be denied.

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APPENDIX A

The following are the relevant provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063–1077) which Act, as amended, now constitutes Part I of the Federal Power Act of August 26, 1935 (49 Stat. 838; 16 U. S. C. §§ 791a–823).

SEC. 3. That the words defined in this section shall have the following meanings for the purposes of this Act, to wit:

* * * * *

"Net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expendi-

tures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the commission.

SEC. 4. That the commission is hereby authorized and empowered—(a)

* * * * *

In order to aid the commission in determining the net investment of a licensee in any project, the licensee shall, upon oath, within a reasonable period of time, to be fixed by the commission, after the construction of the original project or any addition thereto or betterment thereof, file with the commission, in such detail as the commission may require, a statement in duplicate showing the actual legitimate cost of construction of such project, addition, or betterment, and the price paid for water rights, rights of way, lands, or interest in lands. The commission shall deposit one of said statements with the Secretary of the Treasury. The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto.

* * * * *

SEC. 10.

* * * * *

(d) That after the first twenty years of operation out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual,

legitimate investment of a licensee in any project or projects under license the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of

not less than ten years thereafter in a manner to be described in each license: *Provided,* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

* * * * *

SEC. 14. That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which

is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by agreement between the commission and the licensee, and in case they cannot agree, by proceedings in equity instituted by the United States in the district court of the United States in the district within which any such property may be located: *Provided,* That such net investment shall not include or be affected by the value of any lands, rights of way, or other property of the United States licensed by the commission under this Act, by the license, or by good will, going value, or prospective revenues: *Provided further,* That the values allowed for water rights, rights of way, lands, or interest in lands shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon

payment of just compensation is hereby expressly reserved.

* * * * *

SEC. 16. That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

* * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regu-

lation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person,

corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved

February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

* * * * *

SEC. 23. That the provisions of this Act shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed, the fair value of said project or projects, determined as provided in this section, shall for the purposes of this Act

and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they can not agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.

That any person, association, corporation, State, or muncipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted

to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

SEC. 26. That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of War, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and as-

sume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license.

* * * * *

SEC. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

APPENDIX B

Section 313 (b) of the Federal Power Act of 1935, amending the Federal Water Power Act of 1920 (49 Stat. 838, 16 U. S. C. 825*l* (b)), provides:

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Com-

mission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX C

Article V of the 1910 International Boundary Water Treaty between the United States and Canada (36 Stat. 2448, 2450) provides as follows:

> The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.
>
> So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.
>
> The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.
>
> The United Kingdom, by the Dominion of Canada, or the Province of Ontario,

may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

APPENDIX D

The following are the relevant provisions of the "Classification of Investment in Road and Equipment of Steam Roads, Issue of 1914, Interstate Commerce Commission," promulgated as a part of the Commission's own rules and regulations—Code of Federal Regulations, Title 18, part 103.

Section 103.02–1 of the "Classification" provides as follows:

> ACCOUNTS FOR INVESTMENT IN ROAD AND EQUIPMENT.—The accounts prescribed in this classification are designed to show the investment of the carrier in property devoted to transportation service. The carrier's investment in physical property other than transportation property is provided for in balance-sheet account No. 705, "Miscellaneous physical property." *The carrier* means the accounting carrier, except when otherwise specifically indicated. The carrier's records shall be kept in such form that expenditures for additions and betterments may be reported separately from those for original road, original equipment, and road extensions, and shall show separately the expenditures under each authorized addition and betterment project. (See balance-sheet account No. 701, "Investment in road and equipment," and No. 702, "Improvements on leased railway property.")

Section 103.02–2 of the "Classification" provides:

ITEMS TO BE CHARGED.—To these accounts shall be charged the cost of original road, original equipment, road extensions, additions, and betterments; also the estimated values at time of acquisition of right of way and other road and equipment property donated to the carrier, except that unless authorized by the Commission no charges shall be made to these accounts after July 1, 1914, for donations received previously to that date. Applications to the Commission for including such items in the road and equipment accounts shall contain full information concerning the source and character of the donations.

If the total cost of additions and betterments to any class of equipment, or any class of fixed improvements (except tracks), under a general plan, considered as a whole, is less than $200, the option may be exercised of charging the amount expended to the appropriate account in Operating Expenses. This rule is not to be construed as authorizing the parceling of expenditures in order to bring them within this limit.

Construction includes all processes connected with the acquisition and construction of original road and equipment, road extensions, additions, and betterments.

Original road means the land and fixed improvements provided and arranged for in the original plan for the construction of a new road. When the acquisition of any such fixed improvements under the original plan is deferred, such improvements, when acquired, shall be considered as additions. Original road shall not be construed to include fixed improvements which, under the original plans for the road, it is proposed

to substitute at some time subsequent to the beginning of commercial operations for the improvements originally installed and used for transportation operations, such as steel bridges substituted for trestles.

Original equipment means equipment provided and arranged for under the original plan for the construction of a new road. When the acquisition of such equipment under the original plan is deferred, such equipment, when acquired, shall be considered as additions.

Road extensions means the land and fixed improvements provided and arranged for in the original plan for the construction of extensions of existing main lines, additional branch lines, and extensions of existing branch lines. When the acquisition of any such fixed improvements under the original plan is deferred, such improvements, when acquired, shall be treated as additions. Road extensions shall not be construed to include fixed improvements which under the original plans for the extensions it is proposed to substitute, at some time subsequent to the beginning of commercial operations, for the improvements originally installed and used for transportation in connection with commercial operations, such as steel bridges substituted for trestles.

Equipment means the rolling stock, boats, highway vehicles, horses, and harness devoted to transportation service, the cost of which is includible in the equipment accounts.

Fixed improvements means structures which are fixed as to location, such as tunnels, bridges, buildings, earthworks, etc.

Additions are additional facilities, such as additional equipment, tracks (including timber and mine tracks), buildings, bridges, and other structures; additions to such facilities, such as extensions to tracks, buildings, and other structures; additional ties laid in existing tracks; and additional devices applied to facilities, such as air brakes applied to cars not previously thus equipped. When property, such as a section of road, track, unit of equipment, shop or power plant machine, building, or other structure, is retired from service and replaced with property of like purpose, the newly acquired property shall, for the purpose of this classification, be considered as an addition, and the cost thereof accounted for accordingly. (See section 103.02–7.) If, however, the property retired and replaced is of minor importance, such as a small roadway building or other structure, and is replaced in kind without betterment, the cost of the replacement shall be charged to Operating Expenses, and no adjustment made in the road and equipment accounts.

Betterments are improvements of existing facilities through the substitution of superior parts for inferior parts retired, such as the substitution of steel-tired wheels for cast wheels under equipment, the application of heavier rail in tracks, and the strengthening of bridges by the substitution of heavier members. The cost chargeable to the accounts of this classification is the excess cost of new parts over the cost at current prices of new parts of the kind retired. (See section 103.02–12.)

Costs shall be actual money costs to the carrier. Where a portion of the funds expended by the carrier has been obtained

through donations by States, municipalities, individuals, or others, no deductions on account of such donations shall be made in stating the costs. Contributions for joint expenditures should not be considered as donations. The carrier's proportion only of the cost of joint projects, such as construction of jointly owned tracks and elimination of highway crossings at joint expense, shall be included in these accounts.

Section 103.02–3 of the "Classification" provides:

BASIS OF CHARGES.—The charges to the accounts of this classification shall be based upon the cost of the property acquired. When the consideration given for the purchase or the improvement of property the cost of which is chargeable to the accounts of this classification is other than money, the money value of the consideration at the time of the transaction shall be charged to these accounts, and the actual consideration shall be described in the record in sufficient detail to identify it. The carrier shall be prepared to furnish the Commission, upon demand, the particulars of its determination of the actual cash value of the consideration, if other than money.

Section 103.41 of the "Classification" provides:

COST OF ROAD PURCHASED.—This account shall include the cash cost of any road or portion thereof purchased. Where the contract of purchase includes not only road, but also equipment, securities, and other assets, the appraised value of such equipment, securities, and other assets shall be deducted from the total cash cost, and the remainder of the cash cost shall be charged to this account. Where the consideration given for

the property purchased is other than cash, such consideration shall be valued on a current cash basis. If the consideration includes the assumption of liabilities, such liabilities shall be included in the determination of the cost at their cash value at the time the contract is made.

This account shall be used only as a clearing account in which temporarily to carry the cost of road purchased until such time as a plan for distributing such cost to the primary accounts appropriate for the property is approved by the Commission.

NOTE A.—The appraised value of any equipment thus acquired shall be charged to the appropriate equipment accounts. The value, at time of purchase, of any securities, or other assets acquired, shall be included in the accounts appropriate for such assets. The par value of any liabilities assumed shall be included in the appropriate liability accounts, and the necessary adjustments between the cash value charged to the property accounts and the par value shall be made in the appropriate premiums or discount account.

NOTE B.—The carrier shall be prepared to furnish the Commission, upon demand, a full report of the contract of acquisition of each road, or portion thereof, purchased, and a statement showing in detail the consideration given therefor. It should procure, in connection with the acquisition of any such road and equipment, all existing records, memoranda, and accounts in possession or control of the grantor, relating to the construction and improvements of such road and equipment, and shall preserve such records, memoranda, and accounts until authorized by law to destroy or otherwise dispose of them. Where the records, memoranda, and accounts are so intimately involved with other records, memoranda, and accounts of the grantor as to make their transfer impracticable or inadvisable, certified copies of them shall be procured and retained by the grantee. The verity of the copies should be certified by the custodian of the originals.

APPENDIX E

LIST OF "FAIR VALUE" LICENSES

(1) Project No. 77, *Snow Mountain Water & Power Co., Licensee,* Staff reports have been served.

(2) Project No. 78, *Pacific Gas & Electric Co., Licensee,* "Fair Value" determined (See 5th Ann. Rep. of F. P. C. 103).

(3) Project No. 99, *Pacific Gas & Electric Co., Licensee,* "Fair Value" determined (See 13th Ann. Rep. of F. P. C. 186).

(4) Project No. 204, *Washington Water Power Co., Licensee,* "Fair Value" determined (See 4th Ann. Rep. of F. P. C. 165).

(5) Project No. 382, *Southern California Edison Co., Ltd., Licensee,* "Fair Value" determined (See 5th Ann. Rep. of F. P. C. 183).

(6) Project No. 408, *Sitka Wharf & Power Co., Inc., Licensee,* "Fair Value" determined (See 5th Ann. Rep. of F. P. C. 87).

(7) Project No. 415, *Southern Ohio Public Service Co., Licensee,* "Fair Value" determined (See 6th Ann. Rep. of F. P. C. 56).

(8) Project No. 738, *Fred and John F. Dover, Licensees,* "Fair Value" determined (See 8th Ann. Rep. of F. P. C. 123).

(9) Project No. 1250, *Southern California Edison Co., Ltd., Licensee,* Prior authority: Depart-

ment of Agriculture Permit (See 14th Ann. Rep. 160; 1 F. P. C. 633).

(10) Project No. 1318, *Sierra & San Francisco Power Co., Licensee,* Prior authority: Department of Agriculture Permits.

(11) Project No. 1333, *San Joaquin Light & Power Co., Licensee,* Prior authority: Department of Agriculture Permits.

(12) Project No. 1352, *Great Western Power Co., Licensee,* Prior authority: Department of Agriculture Permit.

(13) Project No. 1354, *San Joaquin Light & Power Corp., Licensee,* Prior authority: Department of Agriculture Permit.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 448

THE NIAGARA FALLS POWER COMPANY

v.

FEDERAL POWER COMMISSION.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Dated: December 1, 1943

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Table of Cases

Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

THE NIAGARA FALLS POWER COMPANY, *Petitioner,* *against* FEDERAL POWER COMMISSION.	No. 448.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Petitioner, The Niagara Falls Power Company, respectfully prays this court to reconsider the order made on November 22, 1943, denying its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. In support thereof petitioner respectfully submits:[1]

I

This case turns on whether the present members of the Federal Power Commission may in 1942 repudiate[2] the action of predecessor members in 1921 in issuing to petitioner a license under the Federal Water Power Act—

1. Reference is respectfully made to the petition filed October 22, 1943, for any necessary amplification of the subject matter other than that discussed herein. Sections 23, 6, 26 and 28 of the Federal Water Power Act are printed as Appendix A. The "fair value" provision in petitioner's license is Appendix B.

2. And incidentally overrule *sub silentio* its formal holding that it "* * * regards as *res adjudicata* those questions which were necessarily determined by a predecessor Commission at the time of the issuance of the original license." *In the Matter of Columbia Railway & Navigation Company, Licensee,* 1 F.P.C. 78, 86 (1933).

where Congress did not provide a method of review of the original Commission's action[3]—where the act of issuing a license was complete in and of itself and not subject to continuing authority as to issuance or the provisions to be included therein[4]—where the issuance of the license required the exercise of broad and comprehensive functions[5] and necessarily required an interpretation of the law.[6]

The present Commission, with the approval of the court below, has rejected the "fair value" provision in petitioner's license and substituted in lieu thereof a provision that petitioner's net investment shall be determined on the basis of "cost".

On the authority of *Butte, Anaconda & Pacific Railway Co.* v. *United States*, 290 U. S. 127,[7] we respectfully submit that the present Commission has no such power, that the court below in upholding the present Commission's action in repudiating a license provision and substituting another has decided an important Federal question in utter conflict with the decision of this court.

In the *Butte* case the United States sued to recover moneys paid by the Treasurer of the United States to the railway on a certificate of the Interstate Commerce Commission under §204 of the Transportation Act, 1920, 41

3. *Butte, Anaconda & Pacific Ry. Co.* v. *U. S.*, 290 U. S. 127, 136, 142-143.

4. The license, so the Commission in its First Annual Report advised the Congress, "is a contract between the Government and the licensee [petitioner], expressly contains all the conditions which the licensee must fulfill, and except for breach of conditions, can not be altered during its term either by the Executive or by Congress without consent of the licensee" (R.V., 2860, Ex. 135). The brief in opposition to the writ erroneously analogizes our case to administrative authority in its nature continuing (p. 18).

5. *Butte, Anaconda & Pacific Ry. Co.* v. *U. S., supra*, 136, 142.

6. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48.

7. This case was not directed to the attention of the court on the original application.

Stat. 460, Reimbursement of Deficits During Federal Control. From the court's opinion it appears:

> "* * * Upon due hearing, the Commission concluded that the Railway was entitled to $487,116.31; and it offered to issue a certificate[8] for that amount on condition that the Railway sign a release accepting the amount 'in settlement of all claims against the Government under said Section 204'. *This condition was agreed to.* About two years after the money received had been disbursed by the Railway, partly in dividends to stockholders, partly in the expenses of operation, the Commission issued an order purporting to reopen the proceeding; and set a hearing 'for the purpose of affording the Railway opportunity to show cause why the certificate * * *, should not be revoked and its claim dismissed.'[9] The Railway, appearing specially, protested against the action of the Commission in attempting to reopen the proceeding; and challenged its power to do so.[10] * * * the Commission entered an order purporting to cancel the certificate[11] * * *. * * * the Under-Secretary of the Treasury demanded of the Railway repayment of the $487,116.31 received by it. Repayment was refused. Fourteen months later, this action was begun to recover the money." (p. 133). (Italics supplied.)

Eventually the United States recovered judgment in the District Court and the Circuit Court of Appeals affirmed. The opinion then goes on:

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8. Note the analogy to our case—petitioner's license is a certificate whereby the Government has an irrevocable option to buy petitioner's property at a fixed price—net investment based on "fair value" as to the project property constructed by March 2, 1921.

9. Compare the Commission order herein (R. V, 2889).

10. Compare R. I, 52, 54-56, 74.

11. Compare the Commission's opinion herein (R. V, 2909) and order (R. V, 2891-2895).

"* * * The charge is that the money was paid, because, in 1925, the officials misconstrued the word 'deficit', so as improperly to extend the scope of §204. That is a charge, not of mistake but of error of judgment—a judgment necessarily exercised in the performance of the duties of office. Neither the Commission in issuing the certificate, nor the Secretary of the Treasury, the Comptroller General or the Treasurer when co-operating to make the payment, labored under any mistake of fact; or overlooked any applicable rule of law; or was guilty of any irregularity in proceeding"[12] (p. 134).

"* * * The rule there announced was consistently acted upon for over two years and a half[13]. * * * Then there was a change in the membership of the Commission. * * * it overruled * * * its earlier decision; and * * * instituted against Butte, Anaconda & Pacific Railway Company the proceeding to revoke the certificate on which payment had already been made. Obviously, 'Mistake * * * there was none, but merely a revision of judgment in respect of matters of opinion.' *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 151."

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12. The same is true in our case. There is no disagreement on the facts—the case involves the right of the Commission to apply retroactively its own interpretation of the law to a license—signed, sealed, executed, authorized, delivered and accepted in accordance with law twenty-two years ago.

13. Our record abounds with evidence that the Commission for a period of more than seventeen years recognized the validity of petitioner's license (R. V, 2844, Ex. 128, 2845-2850, Ex. 129, 2854, Ex. 132, 2856-2857, Ex. 133, 2867-2868, Exs. 141-144, 2869-2870, Ex. 145, 2871-2872, Ex. 146). The brief in opposition improperly conveys the impression that the Commission at least by inference repudiated the "fair value" provision of petitioner's license long before 1942 (pp. 10, 18). A direct refutation of this inference is that after the 1927 opinion in another situation was approved and the 1930 opinion of the Solicitor directed to petitioner's project was released, the Commission formally recorded in its published minutes that in 1931 petitioner agreed to make available to Commission examiners certain predecessor company records and the Commission announced, "This procedure contemplates an early determination of *fair value* by mutual agreement as provided in the Act, * * *" (R. V 2869-2870, Ex. 145). Moreover in 1932 in a formal pleading the Commission averred petitioner's license was "duly issued" (R. V, 2872, Ex. 146). As late as 1937 the Commission requested *appraisal* data for "Determination of *Fair Value* as of March 2, 1921" (R. V, 2856).

"* * * The argument is that the Commission had no authority to issue a certificate * * *; and that, having received the money which the officials were not authorized to pay, the Railway must restore it, since in dealings with the Government one is bound, at his peril, to know the limits of the authority of its agents. *We have no occasion to determine which of the Commission's interpretations of the word 'deficit' is the correct one.*[14] For we are of opinion that the Government cannot recover the money paid in 1925, *even if the Commission erred in attributing to the word 'deficit' the meaning then acted on.*" (Italics supplied.)

"* * * The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; * * *. In making those decisions the Commission would necessarily act in a quasi-judicial capacity. If it misconstrued the term 'deficit' it committed an error; but *it did not transcend its jurisdiction.*[15] *Since Congress has not provided a method of review,*[16] neither the Commission nor a court has power to correct the alleged error after payment made pursuant to a certificate. * * * To appreciate the broad scope of the Commission's duty, we must consider the

14. Compare from the court below in our case "* * * it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions." (R. VI, 3121).

15. In our case the Federal Power Commission, on March 2, 1921, did not transcend its jurisdiction—it issued to petitioner a license. This action was within the purview of authority vested in it under the Federal Water Power Act. The brief in opposition (pp. 17-18) and the Commission's opinion (R. V, 2008) erroneously attribute to the original Commission an "unauthorized" and hence a "void" act in issuing to petitioner the license with the "fair value" provision under Section 23. The original Commission made all the findings requisite to a Section 23 "fair value" license, namely, that petitioner had a constructed project and on June 10, 1920 a permit, right-of-way and authority (R. IV, 1988). *Arguendo* the Commission may have erred on a matter of judgment in interpreting the law but it did not do a void act. Hence *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Wilber National Bank* v. *United States*, 294 U. S. 120; and *United States* v. *San Francisco*, 310 U. S. 16, do not apply.

16. The Federal Water Power Act did not provide a method of review in respect of a license issued to and accepted by an applicant.

occasion and character of the legislation and the precise question of construction here involved." (pp. 135-136) (Italics supplied.)

"Under §204, the Commission exercises functions broader than those customarily conferred upon auditing or disbursing officers. It sits as a special tribunal to hear and determine the claims presented.[17] * * * It renders a judgment upon a full hearing. In deciding any one of the enumerated questions of construction, as in other rulings of law or findings of fact, *the Commission may err.*[18] The victim of the error may be either the carrier or the Government. * * * An erroneous decision in favor of the carrier, on any of those questions, may result in the issue of a certificate and the payment thereunder of money which should not, and but for the error would not, be made. *Since authority to pass* upon the meaning of the word 'deficit', and *upon each of the other questions of construction, is*

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17. Mr. Justice Brandeis points out (pp. 139-141) that the Interstate Commerce Commission in passing on claims under §204 had to decide many questions of statutory construction—listing ten.

In granting a license under the Federal Water Power Act or the Federal Power Act, the Federal Power Commission too "sits as a special tribunal to hear and determine the claims presented" (p. 142). Our license was issued as against nine rival applications after public hearing. Likewise, "In making its determinations the Commission was required to decide many things * * *" (p. 136). For example, in our case is the project "such as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water power development, and for other beneficial uses, * * *" (Section 10). Has the applicant submitted "* * * satisfactory evidence that the applicant has complied with the requirements of the laws of the State * * * with respect to bed and banks and to the * * * diversion, and use of water for power purposes * * *?" (Section 9). Does the applicant qualify for a preference under Section 7? And, as in the case of petitioner, does applicant qualify for a "fair value" license under Section 23 or only a "cost" license under Section 4?

18. Compare the statement of the court below—"The petitioner is right in saying that the Commission at that time supposed the case fell within the proviso of §23(a), and meant to issue a license 'for a project already constructed' under a 'permit * * * heretofore granted'. But in that the Commission was mistaken" (R. VI, 3119).

Compare also the statements from the brief in opposition to the writ (p. 19) "* * * from the Commission's correction of the original error."—"If the Commission had made no original error, * * *"—(p. 18) "Nor does the Commission's delay in correcting its error * * *" (p. 17)—"* * * to hold the Commission bound by its original error of law * * *".

> *essential to the performance of the duty imposed upon the Commission, and Congress did not provide a method of review, we hold that it intended to leave the Government, as well as the carrier, remediless whether the error be one of fact or of law''* (pp. 142-143). (Italics supplied.)

This court accordingly reversed the Circuit Court and held in favor of the petitioner railway.

We labor the *Butte* case because it so precisely indicates the need for review in the case at bar.

Arguendo, in our case the original Commission may have erred in interpreting Section 23 to permit issuance of the "fair value" license to petitioner thereunder. We may surmise it construed its authority under Section 23 to permit issuance of a license with the now disputed "fair value" provision to any applicant having a constructed project and having on the effective date of the Act a permit to divert water. Such a construction was at least a possible one. If so, petitioner duly qualified for the "fair value" license and findings in the license so recite. In any event, the original Commission performed an act for which it had statutory authority—it issued the license. As in the *Butte* case, the original Commission had "authority to pass on the meaning of the words" [permit, right of way, or authority as used in Section 23], "and upon each of the questions of construction," since it was "essential to the duty imposed upon the Commission and Congress did not provide a review * * *."

We earnestly submit to this Court that petitioner's situation parallels that of the railway in the *Butte* case and that our case should be reviewed. The Court below in effect has overruled the *Butte* case.

Compare also from *Ness* v. *Fisher,* 223 U. S. 683, 691, a mandamus case:

> "The Secretary's decision, * * * was not arbitrary or capricious, but was based upon a construction of §2 which was at least a possible one, * * *. True, a different construction had been adopted * * * and has since been followed * * * but this, instead of indicating that the Secretary's decision was arbitrary or capricious, illustrates that there was room for difference of opinion as to the true construction of the section, * * *".

We submit that in the instant case of petitioner the unwarranted usurpation of power by an administrative agency should be reviewed by the court to preserve the integrity of proper administrative regulation.

II

The brief in opposition to the granting of the writ conveys the impression that the Commission's orders sought to be reviewed are a simple correction of original error (pp. 17, 18, 19). That is not the fact. What the present members of the Commission have done is to arrogate unto themselves the power to make a new interpretation of the law—Section 23—contrary to that reasonably, and we urge, correctly, entertained by the first members[19] of the Commission and retroactively to apply that interpretation as

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19. Messrs. Newton D. Baker, John Barton Payne and Edwin D. Meredith, as Secretaries of War, Interior and Agriculture, constituted the first Commission whose act in issuing petitioner's license is now undone. Messrs. Baker and Payne were active in the practice of the law and members of the bar of this Court. Secretary Baker, particularly, in the language of the court below, had "a long acquaintance * * * with the subject matter * * * in office and before" (R. VI, 3121). Secretary Baker issued the permits under the Joint Resolutions (R. V, 2709, 2744, 2745) and a legal opinion on the diversionary rights of petitioner's predecessors (R. V, 2834-2839), urged upon the Governor of New York approval of the 1918 legislation forming petitioner (R. V, 2736-2741), and encouraged a constituent of petitioner in 1918 to make a substantial expenditure to enlarge the project upon the Secretary's assurance that he would recommend "suitable federal legislation * * * to include provisions authorizing the issue of long term licenses upon conditions believed to be fair, just and satisfactory" (R. V, 2735).

though the present members of the Commission were substituting themselves for the original members in the initial issuance to petitioner of the March 2, 1921 license.

What the present Commission by its own administrative edict and in violation of the Act has done is to

1. Revoke the "fair value" provision of petitioner's license;

2. Substitute *in invitum* a "cost" provision of its own;

3. Apply that substitute provision, and

4. Effect a confiscation of petitioner's property.

If revocation, modification, amendment or alteration of any of the terms of petitioner's license is required, Congress has laid down adequate procedural provision therefor (Sections 6, 26).

This case should be reviewed because an important question of federal administrative procedure is involved—under what statutory mandate did the Commission issue its orders sought to be reviewed?

III

It is significant that the brief for the Federal Power Commission in opposition to the granting of the writ sought herein contains not a word about our representation that the license in question is a contract (R. Vol. V, 2860, Ex. 135) the terms of which even the United States as a contracting party must respect. In a footnote to page 19 of the brief in opposition it is merely claimed that "Section 28 of the Act providing against legislative amendment or repeal of the terms of any license is of no help to petitioner. There has been no such amendment

or repeal. Moreover the protection to be accorded can reasonably apply only to valid provisions of licenses."

If the substitution of a Section 4 "cost" requirement for the determination of net investment in lieu of a Section 23 "fair value" provision in a license is not amendment or repeal, what can it be? The mere fact that such amendment in this case has been effected by a delegatee of legislative power instead of by the direct action of Congress does not render the saving clause of Section 28 of the Act any the less applicable to petitioner's license.

The suggestion that the saving clause of Section 28 applies only to valid provisions of licenses in effect puts every licensee under the Federal Power Act on notice that provisions of their respective licenses are valid not upon their due issuance by the Federal Power Commission but only after court determination in the event that the same or successor members of the Commission elect to repudiate some provisions.[20]

In the case of the license issued to this petitioner, petitioner is in the hapless position of not knowing now what may eventually be its rights and obligations in respect of any of the considerable number of provisions of its license contract of March 2, 1921. The license is for a term of fifty years. Is petitioner to anticipate that some other one or more of the provisions of the March 2, 1921 license will be modified, eradicated or repudiated by the present or future members constituting the Federal Power Commission? It appears even possible that some future commission may reconsider the very "fair value" provision the repudiation of which has resulted in the present petition to this court. The court below has merely affirmed

20. Compare the argument addressed to this Court by the petitioner in the *Butte* case—"If the position of the Government is sound in this case, each succeeding Commission may make and revoke certificates and treat petitioner's claim as constantly before it." (p. 130).

as modified the orders of the Commission. There is no mandate to stop the Commission from re-examining again the disputed provision or any other provision of the license unless this court will grant review to the petitioner and permit petitioner to establish the validity of its license as written and executed more than twenty-two years ago. The decision of the court below sought here to be reviewed is an open sesame to the present members of the Commission to undo the work of their predecessors at the pain only of possible reversal by the courts. The decision below has thrown in jeopardy every license issued by the Federal Power Commission. These broad implications of the decision below call for its review by this court.

IV

This court, by order made on October 11, 1943, consented to review *Northwestern Electric Company and another* v. *Federal Power Commission*, No. 195, October Term, 1943. From the petition for the writ in the *Northwestern* case it appears that the same Federal Power Commission acting in that case under Part II of the Federal Power Act, in exercising jurisdiction over a public utility, has made an order requiring the Northwestern Company to adjust its books in a manner alleged to be patently inconsistent with applicable law with the resulting confiscation of that petitioner's property. If this court considers the *Northwestern* case to require review we submit that our case—where petitioner's property is confiscated by an exercise of power where no commission or court cites any authority therefor—is likewise entitled to review.

V

When petitioner applied for and accepted a license from the Federal Power Commission issued March 2, 1921, petitioner's securities were listed on the New York Stock Exchange and were highly rated (R. IV, 1981-1983).

Another generation of investors now owns petitioner's stock through the medium of investments in securities of Buffalo, Niagara & Eastern Power Corporation, a holding company owning all petitioner's outstanding stock.

The action of the Federal Power Commission visits upon the holders of Buffalo, Niagara & Eastern Power Corporation securities a substantial loss simply because the present members of the Federal Power Commission have elected to qualify for their office as of March 2, 1921 and thereupon to abrogate the action taken by the then duly constituted Commission.

The surplus deficit to petitioner is approximately twelve million dollars as a result of the Commission's orders.

This retroactive repudiation by the United States of a provision of petitioner's license contract is grounded not on any charge of fraud, concealment, misrepresentation or the like. If that were the case correction of the alleged original error might conceivably be understandable and the denial of the writ sought herein from this Court would not come to petitioner's executives and its counsel as such a shock. But the fact is the repudiation of the "fair value" provision is grounded merely on a reinterpretation of Section 23 of the Federal Water Power Act retroactively applied by successors in office in a continuing administrative agency.

The administrative authority in respect of the granting of the license and of the specific provisions to be included

therein ceased and determined on March 2, 1921 when petitioner duly accepted the license tendered to it in strict compliance with the applicable requirements of the Federal Water Power Act. The administrative authority in respect of the granting of the license was plainly not in its nature continuing.

There remained in fact after March 2, 1921, only a continuing jurisdiction of petitioner to secure compliance with and performance of the license terms.

We submit that no authority is cited for the Commission to reverse itself on the initial question of the issuance of the license contract.

We further submit that the evidence of this record amply supports petitioner's position that the license under Section 23 with the fair value provision was correctly initially issued.

In a matter having the serious and far-reaching implications of the case at bar where a novel doctrine of administrative power arbitrarily to override action of a predecessor commission is asserted the Court should review the case.

VI

We respectfully pray this Court to reconsider its order made November 22, 1943, denying the petition for a writ of certiorari, grant a rehearing to petitioner, upon rehearing to vacate the order and grant the writ herein prayed.

Dated: December 1, 1943.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that this petition for reconsideration is presented in good faith and not for delay.

JOSEPH M. PROSKAUER

Appendix A

Section 23 of the Federal Water Power Act (41 Stat. 1075) reads as follows:

> SEC. 23. That the provisions of this Act shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed, the fair value of said project or projects, determined as provided in this section, shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they can not agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.
>
> That any person, association, corporation, State, or municipality intending to construct a dam or

other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation, it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 6 of the Federal Water Power Act (41 Stat. 1067) reads as follows:

SEC. 6. That licenses under this Act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice.

Appendix A

Section 26 of the Federal Water Power Act (41 Stat. 1076) reads as follows:

"SEC. 26. That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of War, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a pur-

chaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license."

Section 28 of the Federal Water Power Act (41 Stat. 1077) reads as follows:

SEC. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

Appendix B

The "fair value" provision in petitioner's license (R. IV, 2006) is as follows:

> "9. The fair value of the completed parts of the project as of the date of this license shall be determined as early as practicable in the manner prescribed by the Act, and the licensee hereby agrees to accept for the purpose of this license and of any provision of the Act, the fair value so determined, whether arrived at by mutual agreement or as a result of proceedings in or final adjudication by the Courts."